FILED
AUG 30 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 312

GRAYSON-ROBINSON STORES, INC.,
Appellant,

vs.

THE LIONEL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

SIDNEY A. DIAMOND, ESQ.
of New York City,
Attorney for Appellant.

ROOSEVELT, FREIDIN & LITTAUER, ESQS.,
and
HERBERT PRASHKER, ESQ.,
of New York City,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6

POOR COPY

INDEX

	PAGE
The Opinions Below	1
Grounds on Which Jurisdiction Is Invoked	1
i) Nature of Proceeding	1
ii) The Judgment Appealed From	2
iii) Statute Believed to Confer Jurisdiction	2
iv) Cases Believed to Sustain Jurisdiction	2
v) The State Statute Involved	2
Questions Presented by the Appeal	2
Statement of the Case	3
Raising the Federal Questions	4
A. The Due Process Question	5
B. The Commerce Clause Question	6
The Federal Questions Presented Are Substantial	6
1. The Fourteenth Amendment	6
The Old Dearborn Rationale	8
The Schwegmann Case	10
The Non-Signer Clause Violates the Fourteenth Amendment	12
2. The Commerce Clause	15
Conclusion	19

BLEED THROUGH POOR COPY

Appendix

PAGE

New Jersey Revised Statutes, Title 56, Sections 56:4-3 to 56:4-6, inclusive 21

Section 5 of Federal Trade Commission Act, as Amended, Act of July 14, 1952, Chapter 746, 66 Stat. 632 (McGuire Act), 15 U. S. C. § 45 23

Opinion in the New Jersey Supreme Court 25

Opinion in the New Jersey Superior Court, Essex County 35

The Judgments Below 43

Table of Cases Cited

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 230 .....16, 17

Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865 12

Bourjois Sales Corp. v. Dorfman, 273 N. Y. 167, 7 N. E. (2d) 30 (1937) 8

Carter v. Carter Coal Co., 298 U. S. 238, 311, 80 L. Ed. 1160, 1189 14

Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U. S. 888, 89 L. ed. 1436 2

Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311, 61 L. Ed. 326 18

Doubleday, Doran & Co., Inc. v. R. H. Macy & Co., 269 N. Y. 272, 199 N. E. 409 (1936) 8

Eubank v. Richmond, 226 U. S. 137, 143, 57 L. ed. 156, 159 14

Frank Fischer Merchandising Corp. v. Ritz Drug Co. (N. J. Chancery Ct. 1941 19 A. (2d) 454) 14

General Electric Co. v. J. L. Brandeis & Sons, CCH 1954 Trade Cases ¶67,682 (Nebr. Dist. Ct. 1954) 8

PAGE

Grayson-Robinson Stores, Inc. v. Oneida Ltd., 209 Ga. 613, 75 S. E. (2d) 161 (1953), cert. den. 346 U. S. 823, L. ed. adv. 42 (1953) 8

In re Rahrer, 140 U. S. 546, 35 L. Ed. 572 17
International Shoe Co. v. Washington, 326 U. S. 310 .. 17

Liquor Stores, Inc. v Continental Distilling Corp., 40 So. (2d) 371 (1949) (Sup. Ct. Fla., not officially reported) 7, 8

Miles Laboratories, Inc. v. Eckerd, CCH 1954 Trade Cases ¶67,700 (Sup. Ct. Fla., not offiically reported) 8

Nebbia v. New York, 291 U. S. 502 (1934) 12, 14

Old Dearborn Distributing Corp. v. Seagram Distillers Corp., 299 U. S. 183, 81 L. ed. 109 (1936) 6, 7, 8, 9, 10, 11, 15, 19

Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357 ... 17
Pennsylvania v. Wheeling & B. Bridge Co., 18 How. (U. S.) 421, 15 L. Ed. 435 18
Perkins v. Pennsylvania, 314 U. S. 586 17
Prudential Insurance Co. v. Benjamin, 328 U. S. 408, 90 L. ed. 1342 .....2, 17, 18

Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913 9
Robertson v. California, 328 U. S. 440 .....16, 18

Schenley Products Co., et al. v. Franklin Stores Co., 124 N. J. Eq. 100, 199 A. 402 (N. J. Ct. of E. & A. 1938) .. 14
Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384, 95 L. ed. 1035 (1951) 7, 10, 11, 13, 16
Schwegmann Bros. Giant Sugar Market v. Eli Lilly & Co., 205 F. (2d) 788 (C. A. 5, 1953), cert. den. 346 U. S. 856, 98 L. ed. Adv. 154 (1953) 6, 10
Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N. W. (2d) 268 (1952) .. 8
Southern Pacific Co. v. Arizona, 325 U. S. 761, 769, 89 L. Ed. 1915, 1924 (1945) 16, 17, 19

BLEED THROUGH POOR COPY

PAGE

Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 71 L. ed. 718 9

Union Carbide & Carbon Corp. v. White River Distrib. Inc. (Ark. Chancery Ct. 1954), ibid ¶67,781 8

Union Carbide & Carbon Corp. v. White River Distrib., Inc. (U. S. D. C. Ark. 1954), 118 Fed. Supp. 541 8

United States v. Public Utilities Commission, 345 U. S. 295, 304, 97 L. Ed. 1020, 1031 17

Washington ex rel. Seattle Title & Trust Co. v. Roberge, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214 14

Whitfield v. Ohio, 297 U. S. 431 17

Winters v. New York, 333 U. S. 507, 92 L. ed. 840 2

Statutes Cited

Article I, Section 8, Cl. 3, United States Constitution.. 3, 6

Illinois Fair Trade Act 7, 9

McGuire Act, 15 U. S. C. § 45 15

New Jersey Fair Trade Act, New Jersey Revised Statutes §§ 56:4-3 et seq., § 56:4-6; § 56:4-5 .....2, 3, 12, 16

Section 5(a)(4), Federal Trade Commission Act, as amended by the McGuire Act 16

Sherman Antitrust Act, as amended by the Miller-Tydings Act (Act of July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, Act of Aug. 17, 1937, C. 690, Title VII, 50 Stat. 693 (15 U. S. C. § 1) 11

Title 28 United States Code § 1257(2) 2

Title 56, Revised Statutes of New Jersey, §§ 4-3, 4-6, inclusive 2

Supreme Court of the United States

OCTOBER TERM, 1954

No.

GRAYSON-ROBINSON STORES, INC.,

Appellant,

vs.

THE LIONEL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

The Opinions Below

The majority and concurring opinions in the New Jersey Supreme Court are officially reported at 15 N. J. 191 and 15 N. J. 202; they are unofficially reported at 104 A(2d) 304 and 104 A(2d) 309. The opinion in the Superior Court of New Jersey, Chancery Division, Essex County, in which the cause originated, is officially reported at 27 N. J. Super. 54, and is unofficially reported at 98 A(2d) 623.

Grounds on Which Jurisdiction Is Invoked

i) Nature of Proceeding

This action was commenced by appellee in the Superior Court of New Jersey, Essex County, pursuant to the New Jersey "fair trade" law, to enjoin the appellant from sell-

ing products manufactured by the appellee at prices below the "fair trade" prices for those products fixed by the appellee, and to recover damages for sales at such lower prices.

ii) The Judgment Appealed From

The judgment sought to be reviewed is a final judgment of the Supreme Court of New Jersey, dated April 5, 1954, and entered in the office of the Clerk of the Supreme Court of New Jersey on April 5, 1954 granting injunctive relief; the notice of appeal was filed July 1, 1954 in the New Jersey Superior Court, Essex County.

iii) Statute Believed to Confer Jurisdiction

The statutory provision believed to confer jurisdiction of the appeal on this Court is Title 28 United States Code, § 1257(2).

iv) Cases Believed to Sustain Jurisdiction

Winters v. *New York,* 333 U. S. 507, 92 L. ed. 840;
Prudential Insurance Co. v. *Benjamin,* 328 U. S. 408, 90 L. ed. 1342;
Charleston Federal Savings & Loan Ass'n. v. *Alderson,* 324 U. S. 888, 89 L. ed. 1436.

v) The State Statute Involved

The appeal involves the validity of Title 56 of the Revised Statutes of New Jersey, §§ 4-3 to 4-6, inclusive. The pertinent text is found in the appendix hereto.

Questions Presented by the Appeal

1. Is The New Jersey Fair Trade Act, New Jersey Revised Statutes §§ 56:4-3 *et seq.,* and particularly § 56:4-6 thereof, as it applies to persons who are not parties to any

contract entered into pursuant to § 56:4-5 of the said Act, invalid under the Fourteenth Amendment to the Constitution of the United States as a deprivation of property without due process of law?

2. Is the said New Jersey Fair Trade Act, and particularly § 56:4-6 thereof, unconstitutional in violation of the commerce clause (Art. I, § 8, cl. 3) of the Constitution of the United States, as it applies to the retail sale in New Jersey of goods which are distributed by the manufacturer thereof in interstate commerce?

Statement of the Case

The appellant, a California corporation, operates "S. Klein on the Square," a department store in Newark, New Jersey. The S. Klein store policy is to offer merchandise at bargain prices. This is done by reducing costly sales service provided by other stores, and by the economies of large-scale purchasing.

The appellee, a New York corporation, manufactures toy trains and accessories which it distributes in interstate commerce throughout the country. Appellee sought to fix the prices at which these trains can be sold at retail throughout the United States, including the State of New Jersey. To this end, appellee entered into "agreements" with certain New Jersey retailers other than appellant, under which those retailers agreed to sell the appellee's toy trains at prices fixed by the appellee. Section 56:4-6 of the New Jersey Revised Statutes (the so-called "non-signer" clause found in all state "fair trade" acts), prohibits *all* retailers in the state from selling below prices established by an agreement between a vendor and *any* retailer within the state. Appellant, however, not being a party to any such agreement, offered appellee's trains, in accordance with its regular trade policy, at prices below

POOR COPY

those fixed under the appellee's agreements with other retailers. Appellee thereupon commenced this action in the New Jersey Superior Court, Essex County, (a) to enjoin the appellant from continuing to offer appellee's products at below appellee's "fair trade" prices, and (b) to recover damages.

Appellant then moved on the complaint, a moving affidavit, and certain stipulated facts, for summary judgment, on the ground that "there is no genuine issue as to any material fact challenged, and that the defendants are entitled to summary judgment as a matter of law." The Superior Court granted appellant's motion, and dismissed the complaint. The appellee thereupon appealed to the Appellate Division of the Superior Court. Prior to a hearing in the Appellate Division, the cause was certified to the Supreme Court of New Jersey by order of the Supreme Court. The New Jersey Supreme Court reversed the decision of the Superior Court, so far as it denied injunctive relief, and directed that a judgment granting such relief be entered in appellee's favor. An amended summary judgment was thereupon entered prohibiting appellant from selling appellee's toy trains at other than the prices fixed therefor by the appellee.

Raising the Federal Questions

The federal questions presented by this appeal were timely raised by appellant in the Superior Court as independent grounds for granting appellant's motion for summary judgment dismissing the action, and were presented by appellant to the New Jersey Supreme Court as independent grounds for sustaining the judgment of the lower court. Each of these federal questions was necessarily passed upon by the New Jersey Supreme Court in sustaining the constitutionality of the New Jersey statute and in awarding final judgment thereunder. All this is established by the following excerpts from the opinions in the Superior Court and in the Supreme Court:

A. *The Due Process Question*

The Superior Court said:

> ". . . the defendant presents many points, among them that the New Jersey Fair Trade Act and the Federal McGuire Act, insofar as they attempt to bind non-signers are unconstitutional: (1) being in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution and of Article I, Section 1, of the State Constitution; because they deprive the defendant of its property right to sell merchandise at the price it sees fit; and (2) because they unlawfully delegate to private persons, manufacturers and producers, the power to fix prices of commodities not affected with a public interest, without any standards or regulations governing the exercise of the delegated power" (*infra*, p. 36).

The Supreme Court said:

> "The Fair Trade Act is asserted by the defendant to violate the state and federal constitutions upon three grounds. The first two of these are, (a) that the Fair Trade Act constitutes a deprivation of property of the defendant without due process of law or a denial of equal protection of the law, in contravention of the 14th Amendment to the United States Constitution, and also of N. J. Const. 1947, Art. I, pars. 1, 5, and (b) that the Fair Trade Act constitutes an unlawful delegation of legislative power, see N. J. Const. 1947, Art. IV, sec. 1, par. 1, and in this respect also violative of the due process clause of the 14th Amendment, *supra*. • • •.
>
> We find no basis pertinent to the resolution of the Constitutional questions involved upon which to differentiate the Illinois statute considered in the *Old Dearborn* case, *supra*, from the New Jersey Fair Trade Act. To overrule the decision of the former Court of Errors and Appeals in *Johnson & Johnson* v. *Weissbard*, *supra*, would require a declaration that we are no longer bound by the *Old*

Dearborn case, *supra*. It is our conclusion that the *Old Dearborn* case, *supra*, has not been overruled by the United States Supreme Court and is dispositive here" (*infra*, pp. 28-9).

B. *The Commerce Clause Question*

In the New Jersey Superior Court, appellant urged as a separate ground for granting its motion that the New Jersey statute, insofar as it applied to goods like the appellee's moving in interstate commerce, imposed an unconstitutional burden on such commerce in violation of Article 1, Section 8 of the Federal Constitution. The Superior Court found it "unnecessary to pass on this and other questions" (*infra*, p. 42).

In the New Jersey Supreme Court, appellant again urged the unconstitutionality of the New Jersey statute under the commerce clause as an independent ground for sustaining the Superior Court's judgment dismissing the action. With respect to this question the New Jersey Supreme Court stated:

> "The defendant also asserts that the New Jersey Fair Trade Act constitutes an unlawful burden on commerce. Under the decisions above adverted to this argument is without merit" (*infra*, p. 31).

The Federal Questions Presented Are Substantial

1. The Fourteenth Amendment

This appeal squarely requires this Court, we think for the first time (Cf. *Schwegmann Bros. Giant Super Market v. Eli Lilly & Co.*, 205 F. (2d) 788 (C. A. 5, 1953), cert. den., 346 U. S. 856, 98 L. Ed. Adv. 154 (1953)), to determine whether it still adheres to its decision in *Old Dearborn Distributing Corp.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109 (1936). *Old Dearborn* sustained the constitutionality of the "non-signer" provision of the

Illinois Fair Trade Act, and is the constitutional basis for the "non-signer" clauses in the "fair trade" laws of some forty states.

The New Jersey statute here involved is almost identical with the Illinois statute, and the same due process attacks were made upon the Illinois statute in *Old Dearborn* as are made here. We respectfully urge, however, that *Old Dearborn's* reasoning does not survive re-examination; that its basic premise has been invalidated by this Court's recent decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 95 L. ed. 1035 (*"First Schwegmann"*); and that *Old Dearborn* should now be overruled.

The New Jersey statute here requires, *inter alia*, that all retailers of branded merchandise in the State of New Jersey adhere to the retail prices for such merchandise fixed by the manufacturer thereof in an agreement between the manufacturer and any one retailer in the State of New Jersey. Appellant, a "non-signing" retailer, here asserts, as it asserted below, (1) that the State of New Jersey cannot, consistently with the due process clause, require it to sell its property at any particular price, regardless of who fixes the price, solely on the ground that the property bears a brand-name or trademark, and (2) that if New Jersey has the power to fix the price at which appellant can sell that property, New Jersey cannot, consistent with the due process clause, delegate the power to fix the price to private persons, such as the manufacturer, imposing no standards whatever as to a) whether *any* prices shall be fixed, and b) the particular prices to *be* fixed.

As a token of the substantiality of the due process questions here raised, in the face of *Old Dearborn*, we may note that, in recent years, several state courts of last resort have declined to accept the validity of *Old Dearborn's* reasoning, and have held state "fair trade" legislation violative of state due process. *Liquor Stores, Inc.* v. *Con-*

POOR COPY

tinental Distilling Corp., 40 So. (2d) 371 (1949) (Sup. Ct. Fla.; not officially reported); *Miles Laboratories, Inc.* v. *Eckerd*, CCH 1954 Trade Cases ¶67,700 (Sup. Ct. Fla.; not officially reported); *Grayson-Robinson Stores, Inc.* v. *Oneida Ltd.*, 209 Ga. 613, 75 S. E. (2d) 161 (1953), cert. den. 346 U. S. 823, 98 L. ed. Adv. 42 (1953); *Shakespeare Co.* v. *Lippmann's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N. W. (2d) 268 (1952); see also *General Electric Co.* v. *J. L. Brandeis & Sons*, CCH 1954 Trade Cases ¶67,682 (Nebr. Dist. Ct. 1954); *Union Carbide & Carbon Corp.* v. *White River Distrib., Inc.* (Ark. Chancery Ct. 1954), *ibid.* ¶67,781; *cf. Union Carbide & Carbon Corp.* v. *White River Distrib., Inc.* (U. S. D. C. Ark. 1954), 118 Fed. Supp. 541. Several state courts of last resort, applying state constitutions, have indeed followed *Old Dearborn*, but a reading of their opinions suggests that, in doing so, they have been persuaded more by the force of this Court's authority than by the force of its rationale. *E.g.*, see *Bourjois Sales Corp.* v. *Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937) overruling (on the authority of *Old Dearborn*) *Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936) (holding New York statute unconstitutional); see also opinion of New Jersey Supreme Court in instant case (*infra*, p. 29), speaking of state constitutional questions:

> "• • • we are bound by that decision of the United States Supreme Court [Old Dearborn] until it is overruled by the United States Supreme Court."

The Old Dearborn Rationale

The basic premise of *Old Dearborn* is that state fair trade laws are not "legislative price fixing", even though the plain fact is that it is the authority of the state, and that alone, which requires all retailers to abide by the resale price which some other retailer has agreed to respect (see 299 U. S. at 192). It must be noted that the opinion

of this Court in *Old Dearborn* accepted the authority of *Tyson & Bro.-United Theatre Ticket Offices* v. *Banton*, 273 U. S. 418, 71 L. ed. 718, holding that a state could not fix the resale price of theatre tickets, and of *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, holding that a state could not fix the charge for the services of an employment agency (see 299 U. S. at 191-2). To sustain the constitutionality of the Illinois Fair Trade Act, the *Old Dearborn* Court therefore could not, and did not, assert the power of the State to fix prices. Instead, it was at pains to note that the resale price restriction applied only to those who have acquired the subject merchandise with "knowledge" of the "restriction" on the resale price; that it applies only to "a forbidden use of the trade-mark, brand or name" attached to the merchandise in connection with its resale, and not to the merchandise apart from the "trade-mark, brand or name" (299 U. S. at 193). The Court then stated (*ibid.*):

> "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned."

This reasoning, we submit, begged the real question. There *is* no "existing restriction" on the non-signer's resale price unless the State imposes one. And the non-signer's knowledge, before he acquires the property, that the State has *attempted* to impose it does not give the State *power* to impose it. In short, *Old Dearborn* avoids deciding whether the State can enforce uniform resale

prices by an illogical argument founded on the fictional premise that the recalcitrant retailer has given his "assent" to the price restriction.

The fiction of implied "assent" was also *Old Dearborn's* answer to the claim of unconstitutional delegation of power to fix prices (293 U. S. at 194):

> "We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in *Eubank* v. *Richmond*, 266 U. S. 137, 143, 57 L. ed. 156, 158, 33 S. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214, 49 S. Ct. 50, 86 A. L. R. 654; and *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 80 L. ed. 1160, 1188, 56 S. Ct. 855. In those cases the property affected had been acquired without any pre-existing restriction in respect of its use or disposition. The imposition of the restriction in invitum was authorized after complete and unrestricted ownership had vested in the persons affected. Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it."

The Schwegmann Case

This Court's recent opinion in *Schwegmann Bros.* v. *Calvert Distillers Corporation*, 341 U. S. 384, 95 L. ed. 1035 (1951) (*"First Schwegmann"*) destroyed the implied "assent" premise, on which *Old Dearborn* was based. In this connection, we may note the conclusion of HOLMES, *C.J.*, dissenting, in *Schwegmann Bros. Giant Super Mkts.* v. *Eli Lilly & Co.*, 205 F. (2d) 788, 794 (CA 5, 1953) that *First Schwegmann* "has opened the door for a re-consideration of the constitutionality of fair trade laws as price fixing statutes."

The issue in *First Schwegmann* was whether the enforcement of non-signer clauses under state "fair trade"

laws constituted combinations or conspiracies in restraint of trade under the Sherman Antitrust Act, as amended by the Miller-Tydings Act (Act of July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, Act of Aug. 17, 1937, C. 690, Title VII, 50 Stat. 693, 15 U. S. C. § 1). The Miller-Tydings Act had exempted from the prohibitions of the Sherman Act "contracts or agreements prescribing minimum prices" for the resale of certain commodities, when such contracts or agreements were valid under state law with respect to intrastate transactions. It was claimed in *First Schwegmann* that this exemption authorized enforcement of "fair trade" prices against the non-signer as well as against parties to resale price maintenance contracts. *Old Dearborn* had said that the non-signer gives his "assent" to the price restriction by voluntarily purchasing the goods for resale. In *First Schwegmann*, this Court said that it was precisely the *absence* of consent by the non-signer which placed enforcement against him outside the Miller-Tydings exemption:

> "They can fix minimum prices pursuant to their contract or agreement with impunity. When they seek, however, to impose price-fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price-fixing by contract or agreement; that is price-fixing by compulsion. That is not following the course of consensual agreement; that is resort to coercion" (341 U. S. at 388).

First Schwegmann thus repudiates the fictional premise on which *Old Dearborn's* holding was founded—that the non-signer's obligation to respect the "fair trade" price has its source in the non-signer's "assent", not in "legislative price-fixing". And once the non-signer clause is frankly acknowleged to involve price-fixing by legislative fiat, it is apparent that the due process questions presented here are precisely the questions which were avoided —and not decided—by *Old Dearborn*: Does the State have

POOR COPY

the power to fix resale prices on branded merchandise? If the State has such power, can it delegate to private persons the power to determine *when* resale prices shall be fixed, and *what* the prices shall be? Those questions are substantial, and have not been determined by this Court.

The Non-Signer Clause Violates the Fourteenth Amendment

This Court has gone far to sustain the power of the Federal and State Governments to fix prices. See *e.g., Nebbia* v. *New York,* 291 U. S. 502 (1934), and cases collected, *Nebbia* states that "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty" (291 U. S. at 539). The New Jersey Fair Trade Act fails to meet this standard of due process.

In cases in which price regulation has hitherto been validated in this Court it has been possible to demonstrate that the challenged legislation was designed to deal with an evil affecting the particular industry being regulated, or, to deal with a general inflation or the like threatening all industry (*e.g. Block* v. *Hirsh,* 256 U. S. 135, 65 L. ed. 865) and that the remedial measures provided were reasonably designed to deal with the problem which called them forth. Accordingly, we need not argue here that the State of New Jersey would not, under any circumstances, have power to regulate the resale price of toy trains. The New Jersey statute here is applicable indiscriminately to steel girders as well as to toy trains, to goods having limited and local distribution, as well as nationally advertised goods, to sales by wholesalers, by jobbers to industrial users, as well as to sales by retailers to private consumers.

We venture to say that no other price-fixing legislation heretofore validated by this Court—with the exception of temporary measures against inflation—is applicable to any thing like the wide range of goods and industries to which state "fair trade" statutes apply.

In cases where price legislation applied to a relatively large number of goods or services, some machinery has generally been provided by which the legislative policy could be responsibly particularized and applied to individual industries and individual situations. No such mechanism is here provided for determining whether, in particular industries, or at particular resale levels, conditions exist which justify the imposition of price restrictions, or for otherwise adapting legislative policy to self-evident differences in different industries. Indeed, the statute contains no statement of legislative findings of the supposed evils to which the legislatively enforced price retrictions are addressed.

The power of the "vendor" to determine whether resale price restrictions shall become applicable does not supply any machinery for adapting legislative policy to particular situations. The "vendor" who makes the restrictions applicable is left free to create the restrictions for private reasons of his own, and for reasons wholly unrelated to the legislative policy. The range of private reasons, unrelated to any standard of public welfare, which may move the vendor to act, is suggested by the facts (a) that resale price maintenance was unlawful at common law, (b) was, until recently, a federal crime (*First Schwegmann*) in every state, and indeed(c) is still a federal crime in states which do not have "fair trade" laws.

In sum, the statute is completely arbitrary because, being applicable indiscriminately to resales at every level, in all industries, it is not and cannot be based upon a responsible legislative determination that evils exist which

BLEED THROUGH POOR COPY

require the remedy of resale price maintenance at any particular resale level in any particular industry or industries.

But worst of all, the price restrictions actually imposed are themselves "irrelevant to [any] policy the legislature is free to adopt" (see *Nebbia, supra*) and are determined and enforced by a procedure so arbitrary as to offend due process. The statute leaves to the "vendor" (who may even be a person other than the manufacturer, acting without the manufacturer's consent, *Schenley Products Co., et al.* v. *Franklin Stores Co.*, 124 N. J. Eq. 100, 199 A. 402 (N. J. Ct. of E. & A. 1938); *Frank Fischer Merchandising Corp.* v. *Ritz Drug Co.* (N. J. Chancery Ct. 1941 19 A. (2d) 454), the power to determine (a) whether *any* compulsory resale price shall be fixed, and (b) *what* that price will be. The statute provides no standards for relating either of these private determinations to any statutory policy. The appellant is here enjoined from selling the appellee's toy trains for $16.87. But if the appellee and appellant had agreed to fix the price at $16.87, New Jersey would *compel* every retailer in the State to sell *at* that price.

If the State has constitutional power to enforce a uniform resale price structure, there is no power to give to private parties the right to legislate *when* there shall be a uniform price, and *what* that uniform price shall be. Such a delegation of legislative power to private persons is so arbitrary as plainly to violate due process. *Eubank* v. *Richmond*, 226 U. S. 137, 143, 57 L. ed. 156, 159; *Washington ex rel. Seattle Title & Trust Co.* v. *Roberge*, 278 U. S. 116, 121, 122, 73 L. ed. 210, 213, 214; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 80 L. ed. 1160, 1189. As *Carter* says:

> "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to others in the same business. * * *

> "The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." [Citing *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. at p. 537, 79 L. ed. 1584, and cases cited *supra*, p. 14.] (298 U. S. at 311, 80 L. ed. at 1189.)

Old Dearborn is no bar to consideration of the due process question raised, nor to the reversal of the judgment below. "To the decision of an underlying question of constitutional law no * * * finality attaches. To endure, it must be right." George Bancroft, quoted at 2 Warren, The Supreme Court in United States History, 749. "* * * [It] is of the highest importance that the Judiciary should always be pervious to demonstration of judicial error as to the original meaning of the Constitution, and prepared to correct its own mistakes." 2 Warren, *id.*

2. The Commerce Clause

Appellant contends that the New Jersey statute, as here applied, is unconstitutional under the commerce clause of the federal Constitution, despite the effort of Congress to immunize "fair trade" legislation from commerce clause objections in the McGuire Act (15 U. S. C. § 45; quoted, *infra*, pp. 22, *et seq.*). The commerce clause aspects of "fair trade" were not raised or determined in *Old Dearborn, supra.*

It was clear from *First Schwegmann, supra,* that the application of the New Jersey Fair Trade Law to goods like appellee's, distributed in interstate commerce, affects the flow of such goods in commerce. By section 5(a)(4) of the Federal Trade Commission Act, as amended by the McGuire Act, Congress attempted to immunize state "fair trade" laws from the resulting commerce clause difficulties. Section 5 exempts "fair trade" contracts, and the enforcement of state "non-signer" clauses from the prohibition of the anti-trust laws. Section 5(a)(4) then provides:

> "Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any rights or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restrain upon, or interference, with commerce."

The essential question here presented is whether this declaration by Congress, is sufficient to validate state "fair trade" laws under the commerce clause. See *e.g Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 89 L. ed. 1915. If not, the New Jersey statute is invalid under the commerce clause, and the judgment here must be reversed.

We are aware, as this Court said in *Southern Pacific Co.* v. *Arizona, supra,* at 769, that "Congress has undoubted power to redefine the distribution of power over interstate commerce." As a corollary to this principle, there are now four established categories into which state regulations affecting commerce may fall, depending on the nature and subject-matter of the regulation, and the silence, acquiescence or disapproval of Congress: (1) Congress being silent, the state regulation is valid under the commerce clause (*Robertson* v. *California,* 328 U. S. 440); (2) the state regulation, otherwise valid, is invalid because Congress has occupied the field or otherwise disapproved (*Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 230); (3) Congress being silent, the state regulation is

invalid under the commerce clause (*Southern Pacific* v. *Arizona, supra;* (4) state regulation, otherwise invalid, is valid because Congress consents (*In re Rahrer,* 140 U. S. 546, 35 L. ed. 572).

We suggest here that the right of Congress to cede jurisdiction over commerce to the States is not an unlimited one and does not extend to all subjects of regulation; that Congress cannot take all matters otherwise falling in (3) and put them in (4).

The kinds of cases in which this Court has found state regulation affecting commerce to be valid by virtue of special Congressional approval are not overly numerous, possibly because only a "few unique federal statutes" (*United States* v. *Public Utilities Commission,* 345 U. S. 295, 304, 97 L. ed. 1020, 1031) provide such approval. States which adopted prohibition laws were permitted to prohibit resale, within the state, of liquors received in interstate commerce. *In re Rahrer, supra,* 576. States which had adopted laws to prohibit prison labor from competing with free labor within the state, were permitted to prohibit the sale, within the state, of imported prison goods. *Whitfield* v. *Ohio,* 297 U. S. 431. States were permitted to levy unemployment insurance taxes on employers engaged in commerce within the State (*Perkins* v. *Pennsylvania,* 314 U. S. 586; *International Shoe Co.* v. *Washington,* 326 U. S. 310).

Prudential Insurance Co. v. *Benjamin,* 328 U. S. 408, 90 L. ed. 1342, which, relying on the McCarran Act (15 U. S. C. §§ 1011-1015), sustained a South Carolina tax on an interstate insurer, was at pains to note first, that the insurance business was "atypical", and, second, that the solution of the commerce clause problems presented by state regulation and taxation of the insurance business "have origin in [the] history" of state regulation following *Paul* v. *Virginia,* 8 Wall. (U. S.) 168, 19 L. ed. 357, and that "their solution cannot escape its influence" (328 U. S. at

413). But more than this, it is apparent, as *Robertson* v. *California,* 328 U. S. 440, makes clear, that the regulation of the insurance business, which Congress, by the McCarran Act, left to the States has, as its principal object and purpose the protection of local policy holders from "fraudulent or unsound insurance"; the regulating state it was said, had a "highly 'specialized interest' " in such regulation (328 U. S. at 458, 448).

Prudential, it is true, contains broad dicta, which rely primarily on *Pennsylvania* v. *Wheeling & B. Bridge Co.,* 18 How. (U. S.) 421, 15 L. ed. 435 and *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 61 L. ed. 326, as to the extent of the power of Congress to leave regulation of commerce to the States. But in neither of the two cited cases had Congress simply left regulation to the States; in the *Bridge* case, Congress had itself declared that a particular bridge was not an unlawful obstruction to commerce; in *Clark Distilling,* Congress itself prohibited the transportation of liquor in interstate commerce to States which had adopted prohibition laws. Significantly, *Prudential* itself stands as a warning that one must judge the commerce clause cases by their results, not their varying rationales (328 U. S. at 423-4).

And the results of those cases are these: whenever this Court, relying on Congressional assent, has sustained state regulation otherwise invalid under the commerce clause, the State regulation has a) either been auxiliary to the enforcement of some local policy, conceived without relation to the commerce itself, or b) has been designed to protect the citizens of the State in their contacts with such commerce. Far from recognizing an unlimited power in Congress to authorize any and all state regulation of interstate commerce, this Court, in each case, was at pains to point out why the regulating state had some special interest in the particular subject matter involved.

"Fair trade" laws do not fit this pattern. They necessarily involve more than the protection of local interests, *e.g.*, local retailers from the competition of "price cutters"; no such protection is afforded to the local interests unless the manufacturer or "vendor" so wills it. Indeed, the supposed "due process" justification for fair trade is that the manufacturer's "good will", not the local retailer, must be protected. See *Old Dearborn, supra,* 299 U. S. at 195. If that be so, a State's regulation of interstate commerce, more often than not, is for the benefit of out-of-state interests, since, in any one state, the likelihood is that most of the nationally advertised merchandise which is most commonly fair-traded will have been imported from out of the state. Significantly, in this connection, appellee thought it appropriate to allege in its complaint that its goods are distributed nationally and that it "fair trades" those goods nationally.

The State statute, then, does more than affect interstate commerce as an incident to the enforcement of some policy having its source in essentially local concerns; it embodies a policy with respect to the commerce itself, a policy conceived, in large or major part, to protect the interests of out-of-state manufacturers whose goods are shipped into the state. No previous decision in this Court holds that the states are free, under the commerce clause, to burden commerce under such regulations, even with Congressional approval. It is submitted, therefore, that the second question presented is a substantial one. Moreover, for the reasons adverted to above in the discussion of the due process question, the statute here imposes a burden on commerce not justified by any reasonable relationship between the regulation and any evil sought to be remedied. *Southern Pacific* v. *Arizona, supra.*

Conclusion

The questions involved are complicated and important, as well as "substantial". They affect the validity of the

"fair trade" laws of some 40 states, and important business interests of retailers, wholesalers and manufacturers in nearly every industry. They ought to be resolved only after plenary consideration by this Court. Probable jurisdiction should be noted and the case should be set down for argument.

Respectfully submitted,

SIDNEY A. DIAMOND, ESQ.
of New York City,
Attorney for Appellant.

ROOSEVELT, FREIDIN & LITTAUER, ESQS.,
and
HERBERT PRASHKER, ESQ.,
all of New York City,
Of Counsel.

Dated: New York City,
August 27, 1954.

APPENDIX

New Jersey Revised Statutes, Title 56, Sections 56:4-3 to 56:4-6, inclusive.

"Article 2. Contract for Sale or Resale of Certain Commodities

Section 56:4-3. *Definitions.*

As used in this article: 'Producer' means grower, baker, maker, manufacturer or publisher.

'Commodity' means any subject of commerce.

'Library' means the following nonprofit organizations administering a collection of books for nonprofit purposes: the national, State, county, or municipal governments; universities, colleges, schools, archives, offices, museums; and literary, educational, professional, scientific, fine arts or religious societies.

Sec. 56:4-5. *Application of article.*

This article shall not apply to any contract or agreement between wholesalers or between producers or between retailers as to sale or resale prices.

This article shall not apply to, or fix or limit prices at which any books may be sold or offered for sale to a library located in this State.

Sec. 56:4-5. *Contracts deemed valid; construction thereof.*

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, or the vending equipment from which said commodity is sold to consumers bears, the trademark, brand, or the name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of this state by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity;

(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof;

(c) By any officer acting under orders of any court.

Sec. 56:4-6. *What constitutes unfair competition; civil liability.*

Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 56:4-5 of this title, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of the producer or distributor of such commodity or at the suit of any retailer selling such commodity at not less than the price stipulated in any contract entered into pursuant to the provisions of section 56:4-5 of this Title."

Section 5 of Federal Trade Commission Act, as amended, Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act), 15 U. S. C. § 45:

(a) (1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements a described in paragraph (2) of this subsection, nor th exercise or enforcement of any right or right of action a described in paragraph (3) of this subsection shall const tute an unlawful burden or restraint upon, or interferenc with, commerce.

(5) Nothing contained in paragraph (2) of this sul section shall make lawful contracts or agreements provi ing for the establishment or maintenance of minimum o stipulated resale prices on any commodity referred to i paragraph (2) of this subsection, between manufacturer or between producers, or between wholesalers, or betwee brokers, or between factors, or between retailers, or be tween persons, firms, or corporations in competition wit each other.

(6) The Commission is empowered and directed to pre vent persons, partnerships, or corporations, except banks common carriers subject to the Acts to regulate commerce air carriers and foreign air carriers subject to the Civi Aeronautics Act of 1938, and persons, partnerships, o corporations subject to the Packers and Stockyards Act 1921, except as provided in section 227(b) of Title 7, fron using unfair methods of competition in commerce and un fair or deceptive acts or practices in commerce.

The Opinions Below

Opinion in the New Jersey Supreme Court:

SUPREME COURT OF NEW JERSEY

No. A89 September Term 1953

THE LIONEL CORPORATION, a corporation of the State of New York, authorized to do business in the State of New Jersey,

Plaintiff-Appellant,

vs.

GRAYSON-ROBINSON STORES, INC., a corporation of the State of California, authorized to do business in the State of New Jersey, and GRAYSON-ROBINSON STORES, INC., a corporation of the State of California, authorized to do business in the State of New Jersey, trading as S. Klein on the Square,

Defendant-Respondent.

Argued February 8, 1954. Decided April 5, 1954.

On appeal from Superior Court, Chancery Division, whose opinion is reported in 27 N. J. Super. 54.

Mr. Samuel Voltaggio argued the cause for the Appellant.

Mr. Sidney A. Diamond, of the New York Bar, argued the cause for the Respondent. Mr. Meyer E. Ruback, and Messrs. Roosevelt, Freidin & Littauer, of the New York Bar, of counsel. Messrs. Ruback, Albach & Weisman, attorneys.

The opinion of the court was delivered by BURLING, *J.*

This appeal stems from a civil action instituted for the purpose of obtaining injunctive and compensatory relief under the "nonsigner" clause of the New Jersey Fair Trade Act, R. S. 56:4-3, *et seq.* The complaint was filed by The Lionel Corporation, a corporation of the State of New York authorized to do business in New Jersey (hereinafter referred to as Lionel) in the Superior Court, Chancery Division. The complaint named as defendant Grayson-Robinson Stores, Inc., a corporation of the State of California authorized to do business in the State of New Jersey, and Grayson-Robinson Stores, Inc., a corporation of the State of California, authorized to do business in the State of New Jersey, trading as S. Klein on the Square (hereinafter referred to as the defendant). The Superior Court, Chancery Division, entered summary judgment for the defendant. *Lionel Corp.* v. *Grayson-Robinson Stores*, 27 N. J. Super. 54 (Chancery Division, 1953). Lionel's appeal to the Superior Court, Appellate Division, was certified by us prior to hearing there.

Lionel manufactures and produces "toy" electric trains, parts, accessories and model railroad equipment under the brand and trade names of "Lionel" and "Lionel Trains." It exercises price regulation by means of resale price maintenance agreements, commonly termed "fair trade contracts," and has entered into agreements of that character with retailers in business in this state.

The defendant operates a nationwide chain of retail stores, including one in the city of Newark, New Jersey. The defendant, although no answer has been filed, admits that it did offer for sale, and sold, Lionel's branded and trade-marked products at less than the prices stipulated in Lionel's resale price maintenance agreements, and insists upon its present right to do so. Lionel contends that the defendant has sold Lionel's "fair trade" protected products at prices as much as 25% to 30% less than Lionel's resale contract prices. This is supported by affidavits and is not controverted.

Lionel's complaint, hereinabove mentioned, asserting these matters of fact and seeking injunctive relief and compensatory demages in reliance thereon, was filed and service was effected upon the defendant. The latter thereupon moved for summary judgment (without having filed an answer to the complaint, see R. S. 4:58-2, formerly *Rule* 3:56-2). The defendant's motion for summary judgment asserted (a) there was no genuine issue as to any material fact challenged and the defendant was entitled to summary judgment as a matter of law, and (b) Lionel's complaint failed to state a claim upon which relief could be granted.

The Superior Court, Chancery Division, granted the defendant's motion and entered summary judgment in favor of the defendant. The opinion filed by the court expressed its findings of fact and conclusions of law. The court concluded that the complaint and affidavits filed showed palpably that there was no genuine issue as to any material fact. Further the trial court found that the New Jersey Fair Trade Act, R. S. 56:4-3, *et seq., supra,* had been held to be constitutional by New Jersey courts of last resort upon the United States Supreme Court decision in *Old Dearborn Distrib. Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109, 106 A. L. R. 1476 (1936), and that the *Old Dearborn* case, *supra,* had not been overruled by *Schwegmann Bros.* v. *Calvert Distillers Corporation,* 341 U. S. 384, 95 L. ed. 1035, 19 A. L. R. 2d 1119 (1951). However the Superior Court, Chancery Division, determined that price adherence may be secured only by virtue of voluntary agreement and therefore compulsory adherence to resale prices stipulated by the manufacturer or producer, *i.e.,* the adherence to such prices required on the part of a retailer who has not voluntarily become a party to the resale price maintenance agreements, such requirement attaching under the "nonsigner" provision of the New Jersey Fair Trade Act, R. S. 56:4-6, is unconstitutional.

On this appeal several questions are involved. These are grouped into four categories. Principal among these is the general question whether the "nonsigner" portion of the New Jersey Fair Trade Act, R. S. 56:4-6, *supra*, is constitutional. Secondarily the questions involved include the constitutionality and application of the McGuire Act, P. L. 542, 82nd Congress, 2nd Session, c. 745 (July 14, 1952). Finally the applicability of the phrase "price stipulated" as set forth in R. S. 56:4-5 and R. S. 56:4-6 under the circumstances of this case and the applicability of factual defenses (alleged lack of notice of Lionel's resale price maintenance agreements, alleged unlawful combination, *i.e.*, "horizontal" price fixing) are included among the questions involved.

I. Constitutionality of The New Jersey Fair Trade Act, R. S. 56:4-3, *et seq.*

The Fair Trade Act is asserted by the defendant to violate the state and federal constitutions upon three grounds. The first two of these are, (a) that the Fair Trade Act constitutes a deprivation of property of the defendant without due process of law or a denial of equal protection of the law, in contravention of the 14th Amendment to the United States Constitution, and also of N. J. Const. 1947, Art. I, pars. 1, 5, and (b) that the Fair Trade Act constitutes an unlawful delegation of legislative power, see N. J. Const. 1947, Art. IV, sec. I, par. 1, and in this respect also violative of the due process clause of the 14th Amendment, *supra*. The third ground of constitutional attack, that the Act creates an unlawful burden upon interstate commerce and therefore violates Art. I, sec. 8, of the United States Constitution, will be adverted to in our conclusion, *post*, concerning the McGuire Act.

This appeal is the first occasion on which an appeal to this court has expressly raised the question of constitu-

tionality of the Fair Trade Act in relation to due process of law, equal protection of the law and delegation of legislative power, although we have heretofore observed in the course of detailing the historical development of "fair trade" that the former Court of Errors and Appeals in *Johnson & Johnson* v. *Weissbard*, 121 N. J. E. 585, 587 (E. & A. 1937) expressly followed the *Old Dearborn* case, *supra*, in this respect. See *General Electric Co.* v. *Packard Bamberger & Co.*, 14 N. J. 209, 215 (1953); *Johnson & Johnson* v. *Charmley Drug Co.*, 11 N. J. 526, 536 (1953).

We find no basis pertinent to the resolution of the constitutional questions involved upon which to differentiate the Illinois statute considered in the *Old Dearborn* case, *supra*, from the New Jersey Fair Trade Act. To overrule the decision of the former Court of Errors and Appeals in *Johnson & Johnson* v. *Weissbard*, *supra*, would require a declaration that we are no longer bound by the *Old Dearborn* case, *supra*. It is our conclusion that the *Old Dearborn* case, *supra*, has not been overruled by the United States Supreme Court and is dispositive here.

Under the circumstances of this case the application of the New Jersey constitutional provisions is governed by the construction and application accorded the 14th Amendment. As we have heretofore stated these questions were directly considered and disposed of with a declaration of constitutionality in the *Old Dearborn* case, *supra*, and we are bound by that decision of the United States Supreme Court until it is overruled by the United States Supreme Court. In *Pennekamp* v. *Florida*, 328 U. S. 331, 335, 90 L. ed. 1295, 1297 (1945), the United States Supreme Court expressly declared:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that intrument which require interpretation to resolve judicial issues. . . ."

POOR COPY

The decision of the United States Supreme Court in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 95 L. ed. 1035 (1951) did not reach the issue of contitutionality of the "nonsigner" clause of the fair trade acts under the 14th Amendment, but was concerned only with interpretation of the federal anti-trust laws and the application of the "nonsigner" clauses of state fair trade acts to interstate commerce. Contrary to the argument asserted by the defendant, we cannot *assume* that the United States Supreme Court would overrule the *Old Dearborn* case, *supra*, if the opportunity to do so should be presented to that tribunal. Such an assumption, even if it were open to us, would be unrealistic in view of the United States Supreme Court's denial of *certiorari* in *Schwegmann Bros. Giant Super Market* v. *Eli Lilly & Co.*, 205 F. 2d 788 (5th cir. 1953) cert. den. U. S. , 98 L. ed. (Adv. Ops.) 57, reh. den. U. S. , 98 L. ed. 154 (1953).

II. Interstate Commerce and The McGuire Act.

The defendant in the proceedings in the Superior Court, Chancery Division and on the appeal to this court has contended that the McGuire Act, P. L. 542, 82nd Congress, 2nd Session, c. 745 (July 14, 1952), constitute an unconstitutional delegation by Congress of the power to fix prices and an unconstitutional delegation by Congress of its power to regulate interstate commerce. United States Constitution, Art. I, sec. 8.

In *General Electric Company* v. *Packard Bamberger & Co., Inc., supra*, we recently held that the McGuire Act was effective to permit application of the New Jersey Fair Trade Act to interstate commerce. The conclusions expressed in our opinion in the *General Electric Company* case, *supra*, are pertinent here although constitutionality of the McGuire Act was not directly resolved therein. Suc-

cinctly, we determine that the McGuire Act is not a delegation of power either to fix prices or to regulate interstate commerce, but is a declaration of consent by Congress that the "nonsigner" provisions of otherwise valid state "fair trade" statutes shall operate on commodities traveling in interstate commerce. The keystone of our decision in the *General Electric Company* case, *supra*, was *Re Rahrer* (*Wilkerson* v. *Rahrer*), 140 U. S. 545, 35 L. ed. 572, 575 (1891). That case and the other authorities discussed in our decision in the *General Electric Company* case, *supra*, control our decision here. *Pennekamp* v. *Florida*, *supra*.

The defendant also asserts that the New Jersey Fair Trade Act constitutes an unlawful burden on interstate commerce. Under the decisions above adverted to this argument is without merit.

III. The "Price Stipulated".

The provisions of the New Jersey Fair Trade Act purport to validate contracts in which the buyer agrees not to resell the seller's branded or trade marked property "except at the price stipulated by the vendor." R. S. 56:4-5, *supra*. The "nonsigner" clause provides that sale, etc., of such property "at less than the price stipulated in such a contract entered into under R. S. 56:4-5, *supra*, is unfair competition. R. S. 56:4-6, *supra*.

The defendant contends that Lionel's "fair trade" contracts failed to comply with the statute because they contained minimum rather than absolute or stipulated prices. The facts are undisputed. This is a question of law and was determined in the plaintiff's favor by the trial court. In this respect the complaint and affidavits palpably show no genuine issue of a material fact. The contract language is unambiguous and clearly states a stipulated price. The defendant's contention in this respect is without merit and it devolves upon the court to declare the judgment which the law imposes.

BLEED THROUGH POOR COPY

IV. Other Defenses.

The defendant also asserted that the "nonsigner" clause of the New Jersey Fair Trade Act (R. S. 56:4-6, *supra*) does not apply to commodities acquired prior to the acquisition of knowledge of the plaintiff's New Jersey resale price maintenance agreements and the prices stipulated therein. The construction asserted by the defendant appears to be required by the clear language of the statute. However as applied to the present case this question is moot as to future matters, since defendant's affidavit shows that it now has knowledge and it was stipulated at the trial level that defendant has none of Lionel's articles in stock. The question is also moot in this case as to past sales by the defendant because there is palpably no genuine issue as to the fact that all New Jersey sales made by it were effected prior to knowledge of Lionel's *New Jersey* resale price maintenance agreements. R. S. 56:4-6, *supra*, requires that underselling, to be actionable, be effected "willfully and knowingly" with respect to prices "stipulated in any contract entered into pursuant to the provisions of section 56:4-5." The complaint and affidavits on file demonstrate that prior to December 17, 1952 the defendant had no knowledge of Lionel's New Jersey "fair trade" contracts, and that no violations of R. S. 56:4-6, *supra*, occurred thereafter.

The defendant also asserts that Lionel's New Jersey "fair trade" contracts are void because they are part of Lionel's nationwide price-fixing policies (adverted to in the complaint). It is argued by the defendant that inasmuch as resale price maintenance is not sanctioned in some of the states, Lionel's policy is in restraint of trade and unlawful.

As a matter of law this defense is devoid of merit as we are bound by the *Old Dearborn* case, *supra*, in this respect. The complaint and affidavits on file show palpably

that there is no genuine issue as to any material fact concerning this alleged defense. The defendant's premise is legally unsound if the New Jersey Fair Trade Act is valid. That statute, and the McGuire Act, contemplate just such a situation. "Vertical" price maintenance is accorded protection here and the mere fact that other states prohibit resale price maintenance of this category does not invalidate the New Jersey "fair trade" agreement under the constitutional philosophy of the *Old Dearborn* case, *supra*. However, strictly "horizontal" price maintenance, namely contract between manufacturers or between wholesalers, or between retailers, which is not involved in the asserted defense, continues to be illegal in this state. *Pazen* v. *Silver Rod Stores, Inc.*, 130 N. J. E. 407, 411-413 (E & A 1941). *Cf. General Electric Company* v. *Packard Bamberger & Co., Inc., supra.*

Conclusion

For the reasons expressed in this opinion the judgment of the Superior Court, Chancery Division, will be reversed insofar as it denied injunctive relief to Lionel, and such relief will be ordered granted to Lionel, *cf. Sheild* v. *Welch*, 4 N. J. 563, 566-567 (1950), but the judgment will be affirmed insofar as it denied Lionel's claim for recovery of damages for past sales. The cause will be remanded to the Superior Court, Chancery Division, for entry of an amended final judgment consistent with this opinion.

Inasmuch as neither party to this appeal completely prevails no costs will be allowed to either party.

Heher, *J.*, concurring.

The holding of *Old Dearborn Distilling Co.* v. *Seagram-Distillers Corporation*, 299 *U. S.* 183, 57 *S. Ct.* 139, 81 *L. ed.* 109 (1936), was that the "non-signer" provision of the typical Fair Trade Law, as a trade technique essential

BLEED THROUGH POOR COPY

to the protection of the manufacturer's or producer's property interest in his trade-mark, brand or like identifying device, did not work a denial of due process of law or the equal protection of the laws or constitute an unlawful delegation of the legislative function. But the inquiry here is whether the State law comports with the security given by our own Constitution to the general principle of freedom of trade.

There is now reason to believe that the Fair Trade principle is used by distributors as a device to stifle price competition, in the name of protection to the producer's property right in his trade-mark. *Eli Lilly & Co.* v. *Schwegmann Bros. Giant Super Markets*, 109 *Fed. Supp.*, ostensibly to serve the producer's interest, but in reality for their own gain; and such is perforce an arbitrary and unreasonable regulation of the non-signer's business and a delegation of the legislative power in violation of our own Constitution.

The record does not show that such is the case here or that the State law is in practice but a regulatory mechanism in restraint of price competition and thus obnoxious to our own constitutional limitations, rather than a means of serving the professed legislative policy of protection for the producer's property in his trade-mark.

Perhaps, the time has come for a legislative reassessment of the policy in the context of prevailing trade practices and concepts and the teachings of experience. There is not sufficient ground in the presentation here for denying the relief sought by plaintiff.

I concur in the result.

Opinion in the New Jersey Superior Court, Essex County:

FREUND, *J. S. C.*

This proceeding brought by The Lionel Corporation seeks to enjoin the defendant, Grayson-Robinson Stores, Inc., from selling or offering for sale "Lionel Trains" or "Lionel Products", manufactured by the plaintiff at less than the list prices established by the plaintiff. The action is brought under the New Jersey Fair Trade Act, R. S. 56:4-3 et seq., and under the McGuire Act, 66 Stat. 632, 15 U. S. C. A. Sec. 45. The defendant has moved for summary judgment as a matter of law.

The complaint and affidavits submitted on the motion palpably show that there is no genuine issue as to any material fact. The following facts are gleaned from the pleadings: The plaintiff, a corporation of the State of New York, authorized to do business in this state, is engaged in interstate commerce, manufacturing toy electric trains under the trade name of "Lionel" and has a price-fixing policy which it endeavors to maintain by means of retail price maintenance agreements and by prices listed in its catalogs. The defendant, a corporation of the State of California, authorized to do business in this state, owns a nation-wide chain of retail stores—one in the City of Newark. The policy of the defendant is to operate its stores on a self-service, cash-and-carry basis, and to sell its merchandise at minimum prices. The defendant asserts that it has never entered into any "fair trade" contract and it has been stipulated that it has no contract with the plaintiff.

The plaintiff has entered into price maintenance agreements with retailers in this state, of which fact it alleges the defendant had notice. The defendant denies having notice but admits it did offer for sale and sold the plain-

POOR COPY

tiff's products at less than the stated list prices, and insists on its right to do so.

The plaintiff contends that the McGuire Act, supra, has encompassed nonsigners and that the defendant's practice of price-cutting, with notice of the plaintiff's price maintenance contracts, constitutes violation of the New Jersey Fair Trade Act, entitling it to an injunction. R. S. 56:4-3 et seq.

In opposition, the defendant presents many points, among them that the New Jersey Fair Trade Act and the Federal McGuire Act, insofar as they attempt to bind nonsigners, are unconstitutional: (1) being in violation of the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution and of Article I, Section 1, of the State Constitution, because they deprive the defendant of its property right to sell merchandise at the price it sees fit; and (2) because they unlawfully delegate to private persons, manufacturers and producers, the power to fix prices of commodities not affected with a public interest, without any standards or regulations governing the exercise of the delegated power.

The plaintiff urges that state fair trade statutes were declared to be valid by the United States Supreme Court in Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 158, 57 S. St. 139, 81 L. Ed. 109, (1936), and that thereupon the courts of this state upheld the constitutionality of our Fair Trade Act and enjoined nonsigners from selling below fixed prices. Johnson & Johnson v. Weissbard, 121 N. J. Eq. 585, (E. & A. 1937). Further, that the defendant is asking this court to overrule these decisions. The defendant concedes that the Court of Errors and Appeals held that our statute did not violate the due process clause, but argues that the court did not pass upon its constitutionality on the issue of unlawful delegation of legislative power. The defendant urges that, to the extent that the United States Supreme

Court has not overruled the Old Dearborn case by its decision in Schwegmann Bros. v. Calvert Distillers Corporation, 341 U. S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, 19 A. L. R. 2d 1119, (1951), this court is free to disregard it; and that the validity of the McGuire Act has not been passed upon by the Supreme Courts of either the United States or of this state.

The historical background of fair trade legislation and decisions pertaining thereto, including the Schwegmann case, are set forth in the opinions of this court and of the Supreme Court of New Jersey in Hoffmann-LaRoche, Inc. v. Weissbard and Johnson & Johnson v. Charmley Drug Co., 19 N. J. Super. 210, (Ch. 1952), affirmed 11 N. J. 541 and 526, (1953). Here, it will suffice to say that price-fixing agreements were illegal as against public policy. Ingersoll v. Goldstein, 84 N. J. Eq 445, (Ch. 1915); prohibited as restraints of trade under the Sherman Anti-Trust Act, 26 Stat. 209, c. 647; 15 U. S. C. A. Sec. 1, (1890); and held violative of the Federal Trade Commission Act, 38 Stat. 717, c. 311, 15 U. S. C. A. Sec. 41, (1914). Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502, (1911). Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441, 42 S. Ct. 150, 66 L. Ed. 307, (1922). However, in 1936, the United States Supreme Court in the Old Dearborn case, supra, upheld the validity of state fair trade statutes sanctioning agreements for retail price-fixing with reference to trademarked or branded commodities sold in fair and open competition with other commodities of the same general class, binding also upon retailers not parties to the contract who had notice of the price agreement. The purported purpose of fair trade statutes is to protect owners of trademarked goods, or distributors, who have built up a good-will for the product, from injurious practices.

In 1937, in order to implement state fair trade acts and to alleviate the proscriptions of the Sherman Anti-Trust

Act upon price maintenance agreements valid under local law, Congress enacted the Miller-Tydings Amendment to the Sherman Act, Title VIII, 50 Stat. 673, 693, c. 690, 15 U. S. C. A. Sec. 1. That amendment provides immunity from the ban of the Sherman Act for "contracts or agreements prescribing minimum prices for the resale" of specified trademarked or branded commodities "when contracts or agreements of that description are lawful as applied to intrastate transactions" under local law. However, the immunity is limited to "vertical" and not to "horizontal" price-fixing by those in competition with each other at the same functional level. The latter continue to be prohibited by the Sherman Act. The New Jersey Fair Trade Act has a nonsigner clause, which was lacking in the Miller-Tydings Amendment. Following the Old Dearborn case, our courts in numerous cases enjoined nonsigners from failing to adhere to price stipulations of the manufacturer. See cases cited in Hoffman-LaRoche, Inc. v. Weissbard, 19 N. J. Super. 210, at page 215.

In Schwegmann Bros. v. Calvert Distillers Corp., supra, the United States Supreme Court held that the Miller-Tydings Amendment immunized only contracts or agreements prescribing minimum resale prices of trademarked commodities in interstate commerce, and that a retailer who had not signed a contract for price maintenance could not be subjected to price observance since the amendment did not encompass noncontracting retailers. On the authority of this case, injunctions against nonsigners were denied in Hoffman-LaRoche, Inc. v. Weissbard, supra, and Johnson & Johnson v. Charmley Drug Stores, supra, and injunctions which had previously been issued were vacated. Johnson & Johnson v. Weissbard, and Burroughs Welcome & Co. (U. S. A.), Inc. v. Weissbard, 11 N. J. 552 (1953).

To overcome the effect of the decision in the Schwegmann case, Congress, on July 14, 1952, adopted the McGuire Act as an amendment to the Federal Trade Com-

mission Act, 15 U. S. C. A. Sec. 45. It purports to include nonsigners within the immunity granted by the Miller-Tydings Act. The pertinent section reads as follows:

> "(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale or selling is or is not a party to such contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby." 15 U. S. C. A. Sec. 45, (a).

Paragraph (4) of the same subsection of the McGuire Act provides that the exercise or enforcement of any right of action under the state statute or public policy should not "* * * constitute an unlawful burden or destraint upon, or interference with, commerce."

Reverting to the arguments of the defendant, I do not consider that the United States Supreme Court has by the Schwegmann decision reversed its decision in the Old Dearborn case. That tribunal has not hesitated to reverse itself whenever the situation demanded, and to say so unequivocally. Nor is it necessary to review the constitutionality of our fair trade act upon ostensible new grounds now raised by the defendant. The court of last resort of our state having upheld its constitutionality, it must presently be assumed to be constitutional on all grounds; and if perchance the act be invalid for reasons not yet argued, such a ruling may be made by the court of last resort upon an appropriate presentation.

Admittedly, both the plaintiff and the defendant are engaged in interstate commerce. The New Jersey Fair

BLEED THROUGH POOR COPY

Trade Act was intended to apply and applies only to intrastate transactions. Hence, if the plaintiff is to prevail, it must be under the McGuire Act. The issue is whether that statute which purports to include nonsigners within the amendment to the Federal Trade Commission Act and which was intended to supply this deficiency in the Miller-Tydings Act, has effectively overcome the obstacles indicated by the Supreme Court of the United States in the Schwegmann case. Can a court of equity lawfully compel a non-assenting retailer to submit to a price-fixing schedule contained in an agreement or contract between a manufacturer of a trademarked commodity and other retailers? Has the pre-Schwegmann concept of the binding effect upon nonsigners been revitalized, or does the interpretation of the opinion in the Schwegmann case preclude such a conclusion?

Courts of other jurisdictions which have considered the validity of the McGuire Act are in conflict. It was held valid in Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 Fed. Supp. 269 (East Dist. La. 1953); General Electric Co. v. S. Klein-on-the-Square, Inc., 129 N. Y. L. J. 583, 1953 C. C. H. Tax Cases, Para. 67, 443 (N. Y. Sup. 1953); Cal-Dak Co. v. Sav-on Drugs, 254 P. 2d 497 (Cal. Sup., March 17, 1953). It was declared unconstitutional by the Supreme Court of Georgia in Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 73 S. E. 2d 161 (Feb. 24, 1953) and state fair trade acts were held unconstitutional by the Supreme Courts of Michigan and Florida in Shakespeare Co. v. Lippmann's Sporting Goods Co., 334 Mich. 109, 54 N. W. 2d 268 (1952) and Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (1949). In the absence of any decision by the United States Supreme Court or the New Jersey Supreme Court, an independent interpretation may be made.

As was observed in Hoffman-LaRoche, Inc. v. Weissbard, 19 N. J. Super. 210, there are valid and forceful eco-

nomic arguments on all sides of the question of the social desirability of fair trade laws. Under fair trade, the price level is probably higher than would obtain under active price competition. The wisdom of fair trade from the social aspect is at least debatable, even though uneconomical in a particular sense. A court is concerned with legality, not social, economic or political philosophy—those considerations are for other forums. It is trite to say that "competition is the life of trade." Competition, whether desirable or not, must be lawful, as is clearly indicated by the many laws which give redress when it is unlawful. Suppression of competition is incompatible with the precepts of a free society. However, price-fixing as an incident to the good-will of a trademarked or branded commodity has been held to be lawful by the decision in the Old Dearborn case. But even a lawful end may not be accomplished by unlawful means, and price adherence may be secured lawfully only through voluntary agreement.

In my view, the Supreme Court of the United States did not reverse its decision in the Old Dearborn case by its ruling in the Schwegmann case—the two opinions are to be read together. In the later case, the court emphasized that price-fixing agreements are valid so long as they are obtained through contract or agreement. What is rendered illegal is compulsory subjection to price adherence. The full significance of the opinion is missed if we fail to grasp from its dynamic phrases the categorical directive that only those who have contracted or agreed, expressedly or impliedly, or who have otherwise voluntarily consented, to be bound, may be held to price observance. This is the theme repeated throughout the opinion and demonstrated by the following excerpts:

> "When they seek * * * to impose price fixing on persons who have not contracted or agreed to the scheme, * * * that is price fixing by compulsion. That is not following the path of consensual agreement;

that is resort to coercion, * * * price maintenance is limited to *voluntary* engagements.

"Contracts or agreements convey the idea of a cooperative arrangement * * *, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing * * *

"* * * we cannot find that the distributors were to have the right to use not only a *contract* to fix retail prices but a *club* as well."

I am led to the conclusion that a court of equity may not issue an injunction to compel a non-contracting, non-assenting retailer to adhere to a price-fixing schedule established by a manufacturer or producer of a commodity not affected by a public interest, and that to that extent the McGuire Act is ineffective. This result renders it unnecessary to advert to the other points raised by the defendant.

Judgment accordingly.

The Judgments Below

MANDATE ON MODIFICATION

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 1538

Civil Action on Appeal

THE LIONEL CORPORATION, a corporation of the State of New York, authorized to do business in the State of New Jersey,

Plaintiff-Appellant,

vs.

GRAYSON-ROBINSON STORES, INC., a corporation of the State of California, authorized to do business in the State of New Jersey, and GRAYSON-ROBINSON STORES, INC., a corporation of the State of California, authorized to do business in the State of New Jersey, trading as S. Klein on the Square,

Defendant-Respondent.

This cause having been duly argued before this Court by Mr. Samuel Voltaggio, counsel for the appellant and Mr. Sidney A. Diamond, of the New York Bar, counsel for the respondent, and the Court having considered the same.

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division be and the same hereby is modified; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the

record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 5th day of April, 1954.

s/ JOHN H. GILDEA
Clerk of the Supreme Court

(A True Copy)

JOHN H. GILDEA
Clerk

FILED
Apr 5 1954

JOHN H GILDEA
Clerk

AMENDED SUMMARY JUDGMENT

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
Essex County Docket
Civil Action

The Lionel Corporation, a corporation of the State of New York, authorized to do business in the State of New Jersey,

Plaintiff,

vs.

Grayson-Robinson Stores, Inc., a corporation of the State of California, authorized to do business in the State of New Jersey, and Grayson-Robinson Stores, Inc., a corporation of the State of California, authorized to do business in the State of New Jersey, trading as S. Klein on the Square,

Defendant.

It appearing that a summary judgment in favor of the defendant, Grayson-Robinson Stores, Inc., was entered by this Court on September 11, 1953; and it further appearing that the plaintiff filed an appeal from said judgment, which was argued on February 8, 1954 and decided on April 5, 1954 by the Supreme Court of New Jersey, and that thereafter its mandate for modification duly issued; and it further appearing that such mandate on modification has been filed with the Clerk of this Court, and that no application for rehearing has been granted or is pending; and other good and sufficient reason appearing therefor;

It is on this 2nd day of June, 1954, Ordered and Adjudged that the summary judgment entered herein on September 11, 1953 be and it hereby is amended and modified; and

It is further Ordered and Adjudged that the defendant, Grayson-Robinson Stores, Inc., its officers, agents, servants, employees, representatives, successors and assigns, and any and all persons acting under its authority and control, or in active concert or in participation with it, be and they hereby are permanently enjoined and restrained from advertising, offering for sale or selling at retail in the State of New Jersey any "Lionel Trains" or "Lionel Products" manufactured by the plaintiff and bearing the plaintiff's trade-marks, brands and trade names, and including "Lionel" electric toy trains, parts, accessories and toy railroad equipment incidental thereto, at prices lower than the retail resale prices now established therefor by the plaintiff by contracts entered into between the plaintiff and other retail dealers in such commodities in the State of New Jersey, or at such retail resale prices as may hereafter be established for such commodities by the plaintiff under the Fair Trade Law of New Jersey; and

It is further Ordered and Adjudged that the plaintiff's claim for the recovery of damages arising out of sales by the defendant of "Lionel" commodities manufactured by the plaintiff, which were acquired by the defendant prior to December 17, 1952, be and it hereby is dismissed; and

It is further Ordered and Adjudged that no costs be taxed or allowed to either party against the other.

/s/ Mark A. Sullivan, Jr.
J. S. C.

Approved as to form only.
Samuel Voltaggio
Atty for Pltff

Meyer E. Ruback
Atty for Deft

COPY

FILED
OCT 1 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 312

GRAYSON-ROBINSON STORES, INC.,
Appellant,

vs.

THE LIONEL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO DISMISS

SIDNEY A. DIAMOND, ESQ.,
598 Madison Avenue,
New York, N. Y.,
Attorney for Appellant.

ROOSEVELT, FREIDIN & LITTAUER, ESQS.,
and
HERBERT PRASHKER, ESQ.,
of New York City,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6

Supreme Court of the United States

OCTOBER TERM, 1954

No. 312

GRAYSON-ROBINSON STORES, INC.,

Appellant,

vs.

THE LIONEL CORPORATION,

Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO DISMISS

The principal purpose of this short answer to Appellee's Motion to Dismiss is to call the attention of the Court to the conflicts between the Record on Appeal and the statements of fact so confidently made in the Appellee's Motion. Not only are these statements unsupported by the Record;* many of them are flatly contradicted by the affidavit of Philip S. Harris, dated December 19, 1952, to which the Appellee declined to reply in the court of first instance despite ample opportunity to do so.

Specifically, Appellee's frequent use of "loss leader," "price bait" and similar emotionally charged terms, together with Appellee's criticism of the commercial prac-

* Pp. 2-17 of Appellee's nineteen-page Motion to Dismiss come almost verbatim from *A Fair Trade Manual for Management*, published by the American Fair Trade Council, Inc. in 1950 (pp. 4-10, 19, 20, 24, 27, 28, 32, 38). From a more neutral viewpoint, the necessity and advantages of "fair trade" appear considerably less obvious. E. g., Corey, *Fair Trade Pricing: A Reappraisal*, 30 Harv. Bus. Rev. 47 (1952); Fulda, *Resale Price Maintenance*, 21 Univ. Chic. L. Rev. 174 (1954); editorial, "Philosophy of Compulsion," *The Wall Street Journal*, Sept. 27, 1954, p. 8.

tices they purport to describe, are simply irrelevant here. The Harris affidavit, standing unchallenged on the Record, states clearly that Appellant did not use Appellee's toy electric trains as "loss leaders":

> "Despite the rather substantial reductions below the plaintiff's [appellee's] retail list prices charged at the S. Klein store, we make a satisfactory profit on every sale. We have found it to be invariably true that the mark-up reflected in so-called 'fair trade' prices is more than we need or want to charge." (Harris affidavit, p. 3.)

The reason for this is the well-known policy of the "cash-and-carry" S. Klein stores to "operate on the basis of low costs, low profits and low prices." (Harris affidavit, p. 2.)

Mr. Harris's affidavit, based on his long experience in retailing, also demonstrates that the retail customer does *not* relate the goodwill of a manufacturer in its trade-mark or brand name to non-competitive, fixed prices. (Harris affidavit, pp. 8-10.) This, too, is undisputed by any evidence adduced on the Appellee's behalf, although the Appellee's Motion to Dismiss appears to assume that the contrary has been established.

In the course of summarizing our Statement as to Jurisdiction, the Appellee charges us with having raised "a frivolous point, to wit, that the McGuire Act . . . is unconstitutional." (Motion to Dismiss, p. 2.) Of course, no such point is directly raised on this appeal.* We did, however, present a separate question concerning the validity of the New Jersey Fair Trade Act under the commerce clause (Statement as to Jurisdiction, p. 3) and we note here that, while Appellee's Motion to Dismiss attempts to deal with the due process question, it apparently fails to recognize the commerce clause question and consequently virtually ignores it.

---

*Cf. the Petition for a Writ of Certiorari in *S. Klein On The Square, Inc.* v. *The Lionel Corporation*, No. 327, this term.

The public importance of the basic issues here, and the consequent need for a definitive resolution of them by this Court, continue to grow. We note, for example, that a trial court in Utah has just declared that State's "fair trade" law invalid under the Utah constitution, thus adding another jurisdiction to the list of those which expressly or by necessary implication question the current validity of this Court's views in the *Old Dearborn* case of 1936. *General Electric Co.* v. *Thrifty Sales, Inc.*, Civ. No. 102665, 3rd Jud. Dist. Ct., Salt Lake Co., Utah, Sept. 24, 1954 (not yet reported). Further indications of widespread interest in the subject appear frequently in the press (e. g., *The Wall Street Journal*, Sept. 23, 1954, pp. 1, 11). The present-day status of State "fair trade" laws under the Federal constitution is a persistent question which requires plenary consideration by this Court.

CONCLUSION

The Appellee has failed to establish that the questions presented are not substantial. The Motion to Dismiss should be denied, probable jurisdiction noted, and the cause set down for argument.

Respectfully submitted,

SIDNEY A. DIAMOND, ESQ.,
598 Madison Avenue,
New York, N. Y.,
Attorney for Appellant.

ROOSEVELT, FREIDIN & LITTAUER, ESQS.,
and
HERBERT PRASHKER, ESQ.,
all of New York City,
Of Counsel.

Dated: New York City,
September 30, 1954.

E COPY

Office - Supreme Court, U.S.
FILED
SEP 24 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954
No. 312

GRAYSON-ROBINSON STORES, INC.,
Appellant,

vs.

THE LIONEL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS

SAMUEL VOLTAGGIO, Esq.,
of Newark, New Jersey,
Attorney for Appellant.

ANTHONY CALANDRA, Esq.,
of Newark, New Jersey,
of Counsel.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
49

TABLE OF CONTENTS

PAGE

Statement 1

Argument 2

Table of Cases Cited

Dr. Miles Medical Company v. John D. Park and Sons Company (1911), 220 U. S. 373 16

Equitable Life Assurance Society v. Brown, 187 U. S. 308 1

Federal Trade Commission v. Beechnut Packing Company (1922), 257 U. S. 441 16

Grayson-Robinson Stores, Inc. v. The Lionel Corporation, 15 N. J. 191, 104 A. 2nd 304 1

Johnson & Johnson v. Charmley Drug Co., 11 N. J. 526 (decided March 2, 1953) 19

Kunsman v. Max Factor and Company, 299 U. S. 198 .. 8

Old Dearborn Distributing Company v. Seagram-Distillers Corp., 299 U. S. 183 .....2, 8, 13, 14, 19

Palmer Oil Corp. v. Amerada Corp., 343 U. S. 390 1

Schwegmann Bros. v. Calvert Distillers Corporation, 341 U. S. 384, 19 A. L. R. 2nd 1119 (1952) 8, 17, 18

Schwegmann Brothers Giant Super Market et al. v. Eli Lilly & Company (June 30, 1953), 205 Fed. Rep. 2nd 788; cert. den. 346 U. S. 856 .....17, 18

Zucht v. King, 260 U. S. 174 1

Other Authorities Cited

Federal Trade Commission Act:
Section 5 16

15 U. S. C. A. #1 .....8, 17

15 U. S. C. A. #45 .....8, 17

Supreme Court of the United States

October Term, 1954

No.

GRAYSON-ROBINSON STORES, INC.,
Appellant,

vs.

THE LIONEL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss on the ground that the appeal does not present any question that has not heretofore been decided by this Court, and that the questions presented by Appellant are so unsubstantial as not to need further argument.

Statement

This is a direct appeal from the Final Judgment of the Supreme Court of New Jersey (15 N. J. 191, 104 A. 2nd 304). A perusal of this opinion will reveal that the questions presented by the Appellant have been explicitly decided by prior decisions of the Supreme Court of the United States so that there is no room for real controversy. *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 311. This appeal therefore should be dismissed. *Zucht* v. *King,* 260 U. S. 174; *Palmer Oil Corp.* v. *Amerada Corp.,* 343 U. S. 390.

Argument

The Appellant's Statement reveals that no error on the part of the Supreme Court of New Jersey is alleged but that substantially this Court should overrule the *Old Dearborn Case*, 299 U. S. 183, and in addition raises a frivolous point, to wit, that the McGuire Act (which was passed by the Congress of the United States in 1952 to exempt fair-trade contracts from the operation of the Sherman Anti-Trust Law and making this exemption binding upon signers and non-signers of fair-trade agreements, is unconstitutional.

The appeal of the Appellant is predicated upon a misconception of fair-trade practices and of the basic philosophy that underlies fair-trade legislation. Forty-five (45) states have enacted laws to protect the consumer, trade-mark owners, and distributors against deceptive, injurious, and uneconomic practices in the distribution of articles of standard quality under a distinguishing trademark, brand or name. These laws are generally known as "Fair Trade Acts".

They permit a manufacturer of a trade-marked or brand-name product to safeguard his investment, his reputation and his hard-earned consumer and distributor good will. Such a manufacturer is permitted to establish, *voluntarily*, a minimum retail price below which his product, in competition with other products of the same general class, may not be sold.

The enactment of Fair Trade Laws became necessary in order to protect the consumer, retailers, and manufacturers, of trade-marked or brand-named products, from the disastrous effects of loss-leader selling and predatory price manipulation, made possible by relatively modern methods of distribution.

Under early systems of merchandising, the sale for consumption was a transaction strictly between two parties—

BLEED THROUGH POOR COPY

the retailer and the consumer. Goods were sold in bulk without identification of source and at prices determined by a process of bargaining participated in by the consumer and the retailer. Quality and prices, both of major interest to the consumer, were not always constant factors.

The advent of the *one-price* store (*i. e.*, a standard price for a product to every purchaser) tended to remove the matter of price from the realm of uncertainty, but the consumer still had no assurance of quality except the retailer's word or reputation.

Not until the sale of trade-marked or brand-named goods in original packages at uniform prices became an accepted method of merchandising did the standards of value in retail trade become fully secured to the consumer.

This newly created standard of values resulted in a shift in the focal point of the consumer's attention away from the retailer toward the manufacturer whose trade-mark the article bore—with a consequent creation of certain legal rights and obligations for the latter.

Today a sale of branded goods, as distinguished from the old sale in bulk, is essentially a transaction between two principals—the manufacturer and the consumer. The manufacturer himself succeeds in doing a large part of the selling. He packs his goods, determines, standardizes, vouches for, and is legally responsible for, their quality, and he advertises them in competition with similar goods of competing manufacturers.

FROM THE VIEWPOINT OF THE CONSUMER, THE SALE OF TRADE-MARKED OR BRAND-NAME GOODS IS ACTUALLY MADE BEFORE HE EVER ENTERS THE RETAILER'S STORE.

In the business sense, the retailer is but an agent for the manufacturer, a conduit to the purchaser. If the manufacturer, through his efforts—for which he alone is responsible—succeeds in creating consumer demand for his product, he acquires good will for his product and name.

Take away from an article which now has or hereafter may gain consumer acceptance the brand-name or trade-mark of the manufacturer that produces it and immediately the incentive for the manufacturer to put into that article the maximum of quality, durability, and style, and to make possible its sale at retail at the lowest possible prices to great numbers of consumers, is gone.

The trade-mark or brand-name is the implement for telling consumers generally the quality, durability, and style, consistent with the minimum price, which the manufacturer of an article bearing his trade-mark puts into that article in order to sell it to consumers directly or indirectly through the wholesalers or retailers. *Competition* is the *life of trade*, but the *trade-mark or brand-name is the life of competition.*

The price manipulating retailer does not operate a charitable enterprise. Through price manipulation, he hopes to achieve either or both objectives; (1) To increase store traffic with the expectation that customers entering his place of business to avail themselves of a "bargain" will at the same time purchase other unrelated articles upon which there is a good margin of profit; (2) to avoid the selling of well-known brand-name items, he advertised, at reduced prices, by switching customers to unknown substitutes upon which he will realize a higher profit. The price manipulator loses a little on a handful of "leaders" while making up this planned loss on less-known overpriced merchandise. *The "loss-leader" is but a "mis-leader."*

On the other hand, his conduct has a very serious effect upon trade-mark owners, competing retailers, and the consuming public.

In order adequately to serve his purpose, the price manipulator is compelled to use as a loss leader an "*Identified Article*" which has already gained wide consumer acceptance and with which the consuming public has come to associate constant quality and reasonable uniformity of

POOR COPY

retail price. Consumer "pull" is achieved only by dangling the lure of an extraordinary bargain, and, since unbranded merchandise furnishes but scant opportunity for price comparison and no guarantee of quality, it is useless as a loss leader. A shining "bait" is indispensable for the price-jockey.

But the price manipulator cannot indefinitely maintain the low price, and he has no inclination to do so except spasmodically when it is to be used as a "lure" or "bait".

The consumer is further injured if a manufacturer, in self-defense, reduces the quality of his product, so he may sell his dealers at a lower price and thereby enable all of them in turn to sell at the old "bait-price" and at the same time maintain a reasonable operating margin on the product.

The net effect of price manipulation is not a lasting benefit to the consumer for it causes the manufacturer to lose markets. The manufacturer is then compelled to make smaller quantities of the product and his costs of manufacture and distribution per piece or per package go up. Continued long enough this means he must either raise his prices and thus further curtail his market, or attempt to recover his market by lowering his prices and diluting quality, thus greatly lessening the value to the consumer. Here is obvious inefficiency and waste in the distribution system for which the consumer ultimately pays.

Straightforward retailers who do not attempt to deceive the consumer through use of a price-manipulation formula find that price comparisons on the bait product favor their competitors. So these straight-forward retailers who normally account for 90% or more of the product's distribution—stop featuring the product or may even discontinue stocking it. Instead of cooperating with their manufacturer to push the sale of his goods, they actually reach the point of urging a customer to accept

some other brand. Their resentment is directed toward the manufacturer and is intensified because some of their customers, attracted to a price-manipulating store by bait of a well-known product at a deceptive price, may transfer all of their patronage to the price-manipulating store, *on the assumption that the price-manipulator sells all other products at bargain prices.* A handful of price-manipulators may thus destroy a manufacturer's market while injuring straight-forward retailers and the consuming public.

The consumer who has a deeply cut price flaunted before him is led to believe that the article is worth no more than is charged by the price-manipulator and that heretofore either the producer or the straight-forward retailer, or both, have been realizing an undeserved profit at his expense. The value of the product, in his eyes, is immediately and appreciably debased. He then becomes more susceptible to the suggestion of the price-manipulator to purchase an unknown, unbranded product upon the representation that it is equal or superior to the brand-name product.

Price manipulation, which thus causes a shift in dealer and consumer attitude toward the manufacturer and his product, is rarely sponsored by the manufacturer. Nevertheless, because of it, he has lost a part of his market, possibly an essential part if profitable operation is to be maintained. True, the manufacturer may attempt to recover his market by advertising so extensively that consumer demand compels dealers to carry the merchandise, but this can be an unnecessary economic waste which he cannot afford.

Instead of increasing sales of the bait item, however, as might normally be expected to result from the publicity afforded the product, even in the price-manipulator's store, the normal flow of the manufacturer's merchandise is strenuously lessened by the price-manipulator's switching of purchasers to substitutes.

The price-manipulator does not operate a charitable enterprise. No retailer sells a $1.00 bill for fifty cents because of his love of the consumer. Such a retailer takes a planned loss of fifty cents in order to attract store traffic and ensnare the consumer. The planned loss of fifty cents is made up many times over through the sale of overpriced, unknown-quality merchandise. Other sharp-practice retailers prefer to be called "price-cutters", "discount-house operators", "cut-rate stores", "I-can-get-it-for-you-wholesale" operators. Their formula is the same, the approach more subtle. Instead of baiting the consumer by offering a $1.00 bill for fifty cents, they employ a well-known, consumer-preferred, fair priced product of quality, utility, and integrity, and use it as the loss leader. In doing so they steal the good-will of the manufacturer in his trade-marked product. Through price manipulation the shady operator is unjustly enriched at the expense of the consumer, the manufacturer, and the straight-forward retailer. Because the price-manipulator's formula is deceptive, uneconomic and results in the over-all gouging of the consumer, Fair Trade laws have been passed by 45 state legislatures to protect the public's interest from this adroit type of fraud and deception. The price-manipulator of Fair-Traded products in states having Fair Trade laws is not a philanthropist but by law is guilty of "unfair competition" and the committor of a Tort, made actionable by statute.

No state has ever repealed a Fair Trade Act. Technically, passage of a revised Fair Trade Act repeals by reference the Old Act, so that both Acts will not be in effect at the same time. This is parliamentary procedure and is not peculiar to Fair Trade.

For many years, producers of trade-marked articles sought to combat such injurious practices. Various methods were used, but none of them proved completely effective.

The logical answer to this problem appeared to be the enactment of statutes that would permit a manufacturer to establish resale prices of his trade-marked goods.

The first Fair Trade law was enacted in California in 1931. At that time it did not provide that the specified prices should be binding on non-contracting parties, but this omission was corrected by an amendment in 1933.

Since 1933, the Fair Trade movement has spread rapidly and now 45 states have enacted Fair Trade laws, the exceptions being Missouri, Texas and Vermont. The District of Columbia also does not have a Fair Trade Act.

In 1936, the constitutionality of such statutes was upheld unanimously by the U. S. Supreme Court in *Old Dearborn Distributing Company* v. *Seagram-Distillers Corp.*, 299 U. S. 183; and in *Kunsman* v. *Max Factor and Company*, 299 U. S. 198.

In 1937, Congress passed the Miller-Tydings Amendment to the Sherman Anti-Trust Act (15 U. S. C. A. #1). Briefly, this amendment provides that nothing in the Sherman Act shall make illegal resale price-maintenance contracts for a trade-marked or brand-name product where these goods move in interstate commerce, if the state of resale has a Fair Trade Act.

Because of the holding of the U. S. Supreme Court in *Schwegmann Bros.* v. *Calvert Distillers Corporation*, 341 U. S. 384, 19 A. L. R. 2nd 1119 (1952), to the effect that the Miller-Tydings Act only exempted "signers" of a minimum price-fixing agreement from the interdiction of the Sherman Anti-Trust Act, Congress passed the McGuire Act which exempted "non-signers" as well as signers, 15 U. S. C. A. #45. The McGuire Act became effective on July 14, 1952.

Under Fair Trade laws, any manufacturer of a competitive brand-name product may protect his consumers, his

resellers and the integrity of his product through Fair Trade. He may establish, with due regard to competitive values, resale prices for his products. Those prices may be altered by the manufacturer at any time to meet competitive or other conditions.

The manufacturer therefore can proceed confidently to improve the quality of his product. Often a product improvement which may add but a small percentage to its cost of production may add largely to its value with relation to retail price.

Outstanding values tend to induce demand. As volume increases, reductions in overhead costs per unit may more than compensate for the small increase in prime costs occasioned by the incorporation in the product of such an improvement.

Resellers who rely primarily on the deceptive loss-leader formula complain loudly that "Fair Trade" violates the principle of a "free market". They shout the virtues of so-called "unrestricted competition". The result is destructive "dog-eat-dog" business practices.

Without the protection of Fair Trade the manufacturer of a popular product selected by retailers as "price bait" is the victim of competition that has "no relation to product value". The competition is for "consumer traffic" through the store. The consumer has never been adequately conscious of the fact that the loss incurred by the retailer on the loss leader must be, and is, made up on other merchandise sold by the store at excessive prices.

The "honored" product selected as a loss leader loses support of smaller neighborhood stores in the area affected. That support may have produced as much as 95% of the sales volume of the product in the particular area. Certainly that neighborhood-store support has been a big factor in building the popularity of the product.

A manufacturer, to stay a little longer in business under unrestrained price-bait pressures, often must cheapen his product arbitrarily, usually without noticeably altering its appearance.

What the public does not know is that an arbitrary reduction even of 5% in the manufacturing cost of a product may reduce its value—its "mileage" per dime of retail price—by as much as 50%.

In such dog-eat-dog competition the consumer invariably gets the worst of it. Wage pressures, of necessity, are downward in the factories affected. Wages buy less real values as the predatory retailer fattens—naturally entirely on the dimes and dollars of the consumers. The predatory retail-price manipulator refers to his price bait as "bargains", "savings", and "economies". Those three words appeal strongly to the frugal American housewife. When used with such intent, they blind her effectively to a common device for the extension of what is perhaps the most vicious form of monopoly—which is monopoly of distribution. The distributive monopolist interposes his controls between the consumer and the sources from which must come the things the consumer needs and wants. The distributive monopolist, once entrenched, therefore, is able to extort at will from the consumer—while dictating prices and product—quality dilutions to the supplier—all in the process of stifling the competition of the smaller reseller.

Fair Trade is basically sound because our economy is propelled by individual incentive. Economic momentum is determined by the sum of all the extraordinary efforts of individuals impelled by hope of personal profit through creative and productive contributions.

Given a substantial measure of protection against theft of the fruits of his diligence—given a sporting chance to win and hold a competence—man becomes resourceful, and learns to cooperate with others in creative and productive enterprise.

So long as he retains his confidence in the stability of laws that protect his profits and his property, man grows in creative and productive strength and skill.

Blast away his protection from piracy, or permit it to decay and he loses all incentive to invent, to produce—or to accumulate.

Fair Trade laws form an important protective pattern in the general network of obstructions to commercial piracies. Upon the tenacity of these obstructions the economic strength of our nation, and its power for defense, must depend.

Resale price maintenance, which is all that the Fair Trade laws permit, involve parties who do not compete with each other; that is, the owner of a trade-mark or brand name on the one hand and the distributors—wholesale or retail—who voluntarily elect to handle the Fair-Traded product.

The trade-mark owner is not permitted to utilize Fair Trade unless his product is in free and open competition with other commodities of the same class. If the Fair-Trading manufacturer specifies an excessive resale price, competition from other trade-mark owners producing similar goods will force down that price. Competition is not nullified.

The Fair-Traded product alone carries the responsibility for its value with relation to its retail price. If that value is not competitive the manufacturer is forced to reduce his price or improve his quality—to maintain and increase his sales volume. Competition may be thrown against the product by Fair-Traded products carrying the brand of the store, or competition may come from products carrying a manufacturer's brand but not Fair-Traded. And competition may come from products carrying no brand at all.

The pretense that Fair Trade pricing eliminates competition between retailers is spurious because any one retailer may choose freely other products with which to contest for the favor of the customers of his competitors.

If the dealer does not have that option the product cannot be Fair-Traded.

True, predatory retail price competition is restricted under Fair-Trade, but only as to the established price of a Fair-Traded product. Competition between retailers remains—in service, sales promotion, salesmanship, display advertising; and is intensified at the real source of all competition, at the manufacturers' level—where brand responsibility to the public is centered and where the value of large investments in manufacturing facilities depends upon the competitive values offered to the public in the product.

The basic competition is, and, in the public interest, should be, between manufacturers of rival brand-name products. This competition exists not only as to price, but as to utility, integrity and quality of product.

The Courts have held uniformly that *a retailer owns the physical product* but does *not own the good-will* as evidenced by the trade-mark or brand name of the product.

It is that good-will alone that makes the product useful as store-traffic lure. A manufacturer's trade-mark or brand name represents his pride in the quality of his product, an acknowledgment to the world that he stands behind his product, an identification and invitation to purchase the product in the future. That is why investment in advertising trade-marked or brand-name products can be justified.

The consumer's preference for a competitively priced, properly distributed, and vigorously advertised product of utility, integrity and quality sums up in going good-will values in the trade-mark or brand name owned by the manufacturer.

The Supreme Court of the United States and the highest Courts of 16 states have declared the Fair Trade Acts constitutional. The U. S. Supreme Court held that the Fair Trade Act was not a price-fixing statute (*Old Dearborn Distributing Co.* v. *Seagram-Distillers Corporation* (1936), 299 U. S. 183). This Court pointed out that the Fair Trade Act does not prevent a purchaser of a commodity bearing a trade-mark or brand name from selling the commodity at any price he chooses unless the purchaser sells with the aid of the good-will of the manufacturer. The Fair Trade Act is designed to protect that good-will against injury. The U. S. Supreme Court said:

> "We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trade-mark stands. Appellants own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will * * *. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with * * *."

Fair Trade is voluntary. The manufacturer may voluntarily establish a minimum resale price for his trade-marked or brand-name product provided it is in competition with other products of the same general class produced by others. The consumer may voluntarily purchase this product or

may reject it and voluntarily purchase competitive products. The contracting reseller voluntarily signs the Fair Trade agreement. The non-contracting reseller voluntarily purchases Fair-Traded goods, knowing that a minimum resale price has been established.

The Supreme Court of the U. S. clearly pointed this out in the *Old Dearborn* case, 299 U. S. 183. The Court said:

> "Appellant here acquired the commodity in question with full knowledge of the then existing restrictions in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under section 2 of the law by which such acquisition was conditioned."

The primary aim of the Fair Trade statute is to protect the good-will of the trade-marked or brand-named product. Accordingly, the U. S. Supreme Court in the *Old Dearborn* case, *supra*, held that:

> "there is nothing in the Act to prevent the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

The Supreme Court of the U. S. in 1936 in *Old Dearborn* unanimously declared the Fair Trade Act constitutional and such illustrious jurists as Chief Justice Hughes, Justice

Brandies and Justice Cardozo participated in this decision. The Supreme Court declared:

1. The primary aim of the Fair Trade Act is to protect the property—the good-will—of the manufacturer.

2. The retailer owns the physical commodity but does not own the trade-mark or good-will that the mark symbolizes.

3. The ownership of the good-will remains in the manufacturer although title to the physical commodity has passed to the retailer.

4. The Fair Trade Act is not a price-fixing Act. (Fair Trade Acts prohibit price fixing.)

5. The Fair Trade Act does not delegate price-fixing power to private individuals but permits trade-mark or brand-name owners to establish by contract minimum resale prices, provided the product is in free and open competition with similar commodities.

6. The Fair Trade Act does not prevent the retailer from selling the physical commodity at any price the retailer wishes. A manufacturer's minimum price schedule applies only when the retailer sells with the aid of the good-will of the manufacturer.

7. The retailer may remove the trade-mark or brand-name from the commodity, thus separating the physical property which the retailer owns from the good-will which the manufacturer owns, and sell the physical commodity at any price the retailer chooses, provided the retailer can do so without utilizing the good-will of the manufacturer as an aid in selling the product.

8. Since the non-contracting retailer acquires the Fair Traded commodity with knowledge of the minimum resale-price restrictions, the voluntary acquisition of the Fair

Traded commodity by the non-contracting retailer carries with it assent to the minimum resale price restrictions.

It should be pointed out that laws prohibiting larceny protect the manufacturer against the theft of his physical property. Fair Trade Laws merely protect the manufacturer against the theft of perhaps his most valuable asset —though intangible—*his good-will.* The good-will of the consumer for the manufacturer's trade-mark or brand-name may perhaps be the sole reason for the sale. This good-will may be weakened or destroyed by price manipulation or price manipulators.

Congress in 1937 enacted the Miller-Tydings Amendment to the Sherman Anti-Trust Act. It is not a "Federal Fair Trade Act". The Miller-Tydings Amendment merely makes lawful the employment of the Fair Trade Act of one state by a citizen of another state.

Through the enactment of the Miller-Tydings Act, Congress signified its recognition of the overwhelming conviction by the individual states that Fair Trade is in the public interest. It eliminated any possible question of illegality over resale price maintenance in interstate commerce or as an unfair method of competition under Section 5 of the Federal Trade Commission Act. (Cf. *Dr. Miles Medical Company* v. *John D. Park and Sons Company* (1911), 220 U. S. 373; *Federal Trade Commission* v. *Beechnut Packing Company* (1922), 257 U. S. 441.)

The Miller-Tydings Amendment provided that nothing in the Sherman Act shall render illegal resale-price maintenance contracts where the commodities move in interstate commerce when the state of resale has a Fair Trade statute. The amendment also provides that the making of such contracts shall not be considered an unfair method of competition under Section 5 of the Federal Trade Commission Act.

However, the Amendment specifically provides that it shall not legalize price maintenance agreements between manufacturers or between distributors who are in competition with each other. By the very fact that this act is an amendment of Section 1, Sherman Anti-Trust Act, the Act of July 2, 1890, see 15 U. S. Code, Sec. 1, as amended, is proof positive that this Act was not nor was it intended to be a Fair Trade Act, so that any attack on this Act or its successor, the "McGuire Act" for lack of constitutionality becomes an idle and futile gesture because the power of Congress to alter, amend or even repeal the Sherman Anti-Trust Act cannot be open to doubt or question. It therefore becomes incumbent on an opponent of Fair Trade Laws to question the constitutionality of the State Fair Trade Act.

The Supreme Court of the U. S. in *Schwegmann Bros. et al.* v. *Calvert Distillers Corp.*, 341 U. S. 384, in an opinion by Mr. Justice Douglas held; since the Miller-Tydings Act did not contain any non-signer provision that it should be construed as sanctioning only "contracts or agreements". This is the extent of this decision insofar as Fair Trade Law is concerned.

Congress removed any and all doubts which Justice Douglas raised in his opinion by the passage of the McGuire Act in July 1952 (see 15 U. S. C. A. #45).

The Federal 5th Circuit Court of Appeals in *Schwegmann Brothers Giant Super Market et al.* v. *Eli Lilly & Company* (June 30, 1953), 205 Fed. Rep. 2nd 788, rejected challenges to the constitutionality of the Louisiana Fair Trade Law and to the McGuire Act. It said (on p. 791):

> "The Schwegmann Case related to the interpretation of the Sherman Anti-Trust Act as amended by the Miller-Tydings Act * * * with respect to the enforcement of state fair trade laws in interstate

> commerce. The Court decided that the intention of Congress was to authorize interstate enforcement against the signers of an express contract or agreement but not against nonsigners. To meet that decision, as has been said, Congress passed the McGuire Act."

The 5th Circuit Court further said in the next paragraph:

> "There is no implication in Schwegmann that Congressional approval of enforcement against nonsigners would be unconstitutional; the implications are to the contrary."

Certiorari was denied by the U. S. Supreme Court, 346 U. S. 856.

The McGuire Act (and also the Miller-Tydings Act) is an "enabling" act. It is not a federal Fair Trade Statute. It permits the application and enforcement of state Fair Trade laws—including the non-signer provision of such laws—with regard to interstate transactions. Since the New Jersey Fair Trade Act does contain a non-signer provision, the McGuire Act removes the objection of the *Schwegmann* case (341 U. S. 384) to enforcement against non-signers in interstate matters.

Furthermore, assuming that an independent interpretation could be made, it is still incomprehensible how the conclusion that the McGuire Act is "ineffective" can be reached in view of the fact that it is not a Fair Trade Act at all but merely an enabling act passed to overcome the objections of the U. S. Supreme Court in the first *Schwegmann* case to the enforcement at that time of non-signer provisions in Fair Trade Acts insofar as interstate commerce was concerned and especially in view of the fact that

Old Dearborn and our Supreme Court in *Johnson & Johnson* v. *Charmley Drug Co., supra,* ruled that non-signers could constitutionally be made to comply with Fair Trade Acts.

It is respectfully submitted, therefore, that the Appellant presents no substantial question for the decision of this Court, and that the appeal should be dismissed.

SAMUEL VOLTAGGIO, Esq.,
of Newark, New Jersey,
Attorney for Appellant.

ANTHONY CALANDRA, Esq.,
of Newark, New Jersey,
of Counsel.

Decisions Per Curiam.

No. 312. GRAYSON-ROBINSON STORES, INC. *v.* LIONEL CORPORATION. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Sidney A. Diamond* for appellant. *Samuel Voltaggio* and *Anthony A. Calandra* for appellee. Reported below: 15 N. J. 191, 104 A. 2d 304.

POOR COPY